IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 446 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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BHOI BHUPENDRABHAI JAYANTIBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 446 of 1990
MR MS DESAI for Petitioner No. 1
MR KT DAVE, Ld. APP for Respondent No. 1
MR JB PARDIWALA as Amicus Curiae

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 03/08/2001

ORAL JUDGEMENT

1. This Criminal Appeal arises out of the judgement and order recorded by the learned Addl. Sessions Judge, Sabarkantha, at Himatnagar, on May 16, 1990 in Sessions Case No.10/1989, convicting the Appellant for offence punishable under Sections 376 and 452 of IPC and sentencing him to undergo rigorous imprisonment for a period of seven years with a fine of Rs.500/- and rigorous imprisonment for a period of six months respectively. The Court directed that in the event of default of payment of fine, the Appellant was to undergo a further rigorous imprisonment for a period of one year. Both the sentences were ordered to run concurrently.

2. The facts of the case in a narrow compass can be said thus:

2.1 One Banubibi, wife of Usefkhan of Idar lodged a FIR on August 21, 1988 with Idar Police. As per the FIR it was stated that she stays in the Bhoiwada area of Idar along with her husband and two children. She was married to her husband about six years back and out of the wedlock, she had delivered a son and a daughter. The husband was trading in scrap. They are staying in the house of one Manilal Bhoi in the Bhoiwada area of Idar on rental basis.

2.2 On the day of the incident i.e. August 2, 1988, while her husband had gone to Bazaar for 'pan' at about 9.30 p.m. and while she was sleeping in the house after bolting the main door from inside with her daughter and son, somebody opened the hole-drop bolted from inside and entered the room. She identified the said person as the present Appellant. After entering the house, he put off the small lamp, which was lit in the house and then put his hand on her mouth and threatened her that if she shouted, she would be done to death. Thereafter, he removed her 'pyjama' as well as his clothes and committed rape on her. She said that he was heavily drunk. After the intercourse was over, he put on his clothes and, at that time, her husband came home and saw the Appellant leaving the house. He, therefore, enquired of him as to what was he doing in the house. The Appellant told him that he had not committed any theft and gave him a couple of fist and kick blows. Because of this, many people from the street gathered. On the basis of the first information, the Police registered the offence and started investigation. The Investigating Agency, having found sufficient evidence, filed charge-sheet against the present Appellant in the Court of the learned JMFC at Idar. The learned JMFC committed the case to the Court of Sessions as the offence is triable exclusively by the

Court of Sessions. On the case being committed, it was registered as Sessions Case No.10/1989 by the Sessions Court.

2.3 Charges against the Appellant were framed at Ex.3. He pleaded not guilty to the charges and claimed to be tried. Therefore, the trial was proceeded with. The learned Additional Sessions Judge, after considering the evidence led by the prosecution came to the conclusion that the prosecution was successful in proving the charges against the Accused and recorded conviction awarding the punishment as stated above.

3. Aggrieved by the said judgement and order, the Accused has preferred the present Appeal. When the matter was called out, the learned Advocate for the Appellant was not present. However, the learned Advocate, Mr.J.B. Pardiwala, who is present in the Court volunteered to assist the Court as Amicus Curiae. The learned APP, Mr.K.T. Dave, appears for the respondent State.

4. The learned Advocate, Mr.Pardiwala, has taken this Court through the Record and Proceedings and his main contention is that the Trial Court has committed an error in evaluating the evidence. He submitted that admittedly the prosecutrix is a married lady aged about 32 years, who is mother of two children. He submitted that admittedly on the day of incident, she was in the house with the main door bolted from inside and obviously none could have entered the house, without her unbolting and opening the door. He submitted that a strong point to indicate her being a consenting party apart from the above aspect is that her husband was normally in habit of going for a 'pan' every evening for about an hour and it was only on that day that he returned within 15 to 20 minutes to find that his wife was almost in a post coitus position and the story is, therefore, got up. There is no evidence to show that there was a forced intercourse. Mr.Pardiwala submitted that admittedly the lady was feeding her suckling daughter and there is nothing whatsoever to indicate any sort of injury to the girl child at the time of commission of rape. If it was forced one, there would have been some resistance, which could have provoked the girl to cry. Mr.Pardiwala submitted that, last but not the least, inspite of the fact that many people gathered, admittedly none is examined by the prosecution to support the case of the prosecutrix. There is a total absence of medical evidence to support the case of the prosecutrix. He, therefore, urged that this Appeal may be allowed.

5. The learned APP, Mr.K.T.Dave, has opposed this Appeal.

6. The prosecutrix has been examined at Ex.30. In her deposition, she stated that the incident occurred on August 21, 1988. She was sleeping in her house with her son and daughter. She was breast feeding her young daughter. She stated that her husband had gone for 'pan' and she had bolted the main door from inside. At about 9.30 p.m., the Accused entered the house by opening the hole-drop bolted from inside by pushing his hand into the door. The lamp was lit at that time. Immediately after entering the house, he gaged her mouth, put off the lamp, and told her that if she shouted, he would kill her with a knife. She then proceeded to say that he removed her 'pyjama' and his trousers and he then committed rape. Thereafter, he went out of the house. At that time her husband came and enquired of the Accused as to what was he doing in the house. The Accused told him that he had not committed any theft and thereafter he gave a couple of fist and kick blows. She has been subjected to cross-examination, where she states that the house has a wooden door and there is no hole in the door, but the doors are loose. She says that she does not know as to how the door was opened. She says that the entire act was committed by the Accused with one hand and the other hand being used for gaging her mouth. She admits that when her husband came, she was washing her private part near the drain. She says that many people gathered and she and her husband disclosed the incident to others. She admits that she had not offered any resistance to the Accused, either by hands or by legs.

7. So far as the medical evidence is concerned, Dr. Sudharsan Kangiri has been examined at Ex.10. She says that two of her teeth were shaky. There was no bleeding therefrom. There were no general injuries on her vulva or vagina. No spermatozoa were found.

8. Dr.P.K.Gohel has been examined at Ex.50. He had examined the Accused and he says there was no indication of any intercourse, which had been allegedly committed by him.

9. The husband of the prosecutrix, Usefkhan is examined at Ex.18. He says that when he came back, he found Accused going out of the house while zipping up his trousers. He says that his wife was washing her private part near drain. He enquired of his wife as to what was she doing. Then she said she was ravished by the

Accused. He went out of the house and asked the Accused as to what had he done and he was told by the Accused that he did not commit any theft and was given a couple of fist and kick blows by the Accused. He also says that people had gathered and he had informed them about the incident. He has also been cross-examined. He states that when he came back to the house he found that there was darkness in the house. He says that for about ten minutes from the time he entered the house he enquired of his wife and she replied to him. Thereafter he went out of the house. The FSL report is produced at Ex.9. It indicates that there were stains of blood and human semen on article No.1 'pyjama', whereas there was no stain of blood or human semen on the pubic hair.

10. Considering the evidence as a whole, it has to be noted that the story of the prosecutrix does not inspire confidence. Even if story of intercourse is accepted, the possibility of prosecutrix being a consenting party as suggested by the learned Advocate, Mr.Pardiwala, cannot be ruled out. The relevant factors to support the contention are that admittedly when the prosecutrix was sleeping in the house, the door of the house was bolted from inside. It was a wooden door and there was no hole in the door. She then states that she does not know as to how the door was opened. There is nothing in the Panchnama to indicate that the door was opened forcibly and, therefore, by necessary inference, no one could have entered the house, unless the door was opened from inside. Apart from this, even the subsequent conduct of the prosecutrix is noteworthy. She offers no resistance to the alleged intercourse. Admittedly, she was sleeping with her baby girl and she was breast feeding her. If the incident occurred in the manner described by the prosecutrix, the child would have definitely suffered some injury or at least she would have raised some cry. Apart from this, even after the commission of rape, when the accused was leaving the house, she did not cry for help or even raise any shout of protest. On the contrary, she quietly goes to the drain and washes her private part. It also requires to be noted that as admitted by the husband of the prosecutrix, it is his practice to go for taking 'pan' every day and that he takes about an hour in doing so. It is also a matter on record that on the day of the incident, he had returned home within 15 to 20 minutes, after taking 'pan' as per the statement of the prosecutrix herself. Above all, it also requires to be noted that although many people had gathered after the incident and were told about the incident, none of them was examined by the prosecution to support the case of the prosecutrix.

11. Taking an overall view of the matter, it appears that the possibility of prosecutrix being a consenting party cannot be ruled out. The learned Trial Judge observed that presence of semen and blood on the 'pyjama' of the prosecutrix were indicative of rape. In this regard, it also requires to be noted that, contrary to the presence of semen and blood on the 'pyjama' of the prosecutrix, no spermatozoa were found when the lady was medically examined after the incident. It is also of importance to note that the blood stains and semen stains found on 'pyjama' were of a non-specific group. The possibility, therefore, that the stains of blood and semen on 'pyjama' being odd cannot be ruled out. Under the circumstances, the Appeal deserves to be allowed and the same is, therefore, allowed. The judgement and order recording conviction of the Appellant is hereby set aside. Fine, if paid, shall be refunded to the accused. The bail bond stands cancelled.

12. Before parting, this Court places on record the appreciation of the assistance rendered by the learned Advocate, Mr.J.B.Pardiwala as Amicus Curiae for Appellant.

3-8-2001 (A.L. Dave, J.)

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